APPENDIX A

Legislative History of Section 106

1. *The House Report.* The House report on the legislation described the measures listed above—the 6 months statute of limitations, the application of *res judicata*, the exhaustion requirement—as designed to expedite deportation proceedings. Thus, for example, the committee stated: "Most important is the fact that the alien may not have a petition for review or for habeas corpus entertained, unless his new petition presents grounds which could not have been presented in the prior proceeding, or unless the court finds that the remedy provided for such prior proceeding was inadequate or ineffective to test the validity of the order." H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), p. 29. Also,

> In an effort to curtail, if not to eliminate repetitious and unjustified appeals to courts for interference with the enforcement of deportation orders, the section declares that an order of deportation or of exclusion shall not be reviewed by a court if the alien has not exhausted his administrative remedies, or if he has departed from the United States. A subsequent petition for review or for habeas corpus will not be entertained if the validity of the order of deportation has been previously determined in any judicial proceeding, unless the new petition presents grounds which the court finds could not have been presented previously, or the court finds that the remedy in the previous proceeding was inadequate or ineffective to test the validity of the order. [*Id.*, at p. 28.]

There is but a single specific reference to the direct review provision, and it does not support even the view that this provision was aimed at expedition, much less that the provision was the most important of the various requirements designed to prevent unreasonable delay. The committee simply said:

> Section 5 [Section 106] of the instant bill contains a number of features which fully establish the propriety and form of judicial review made available to aliens involved in deportation proceedings. The forum is the U.S. court of appeals, where judicial review has been provided for many years respecting orders of other administrative agencies. Since deportation proceedings deal with the liberty of persons rather than mere property, the committee has concluded that granting an initial review in an appellate court gives the alien greater rights, greater security, and more assurance of a close study of his case by experienced judges. [*Ibid.*]

There was some suggestion in the debates that this explanation of the direct review provision as designed to aid the alien was disingenuous.[1] However that may be, and although there is, as we shall indicate, evidence in the debates that at least one reason for direct review was to speed deportation, the point is that the primary evidence of legislative intent, the committee reports, do not support respondent's view that the direct review provision was regarded by the Congress as central to its main purpose.[2]

2. *The House debates.* The debates in the House ranged over several years, since on three occasions prior to enactment of Section 106 it had passed virtually identical bills.[3]

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[1] Congressman Lindsay said that he could not "credit the argument": "District courts deal with questions of 'rights' and 'security' in every criminal prosecution; yet we do not consider that in this area district courts 'give' less 'rights' or 'security' than appellate courts." 105 Cong. Rec. 12729 (1959).

[2] There was no Senate report.

[3] H.R. 13311, 85th Cong., 2d Sess., was passed in 1958, 104 Cong. Rec. 17179; H.R. 2087, 86th Cong., 1st Sess., was passed in 1959, 105 Cong. Rec. 12729; and H.R. 187, 87th Cong., 1st Sess., was passed in 1961, 107 Cong. Rec. 12181, during the same session in which Section 106 was added by the House as an amendment to a Senate bill, S. 2237, and finally enacted. Each of the House bills died in the Senate Judiciary Committee

In general, in those debates, as in the House report, the proponents of the bill described the evil to be remedied primarily in terms, as Mr. Walter put it, of aliens "returning to various courts" and "going from court to court" under the "most frivolous and most arrogantly raised claims," or using judicial review "repeatedly and interminably for the sole purpose of remaining in the United States during the pendency of the never-ending litigation"; or of there being "no [res judicata] limit under existing law" so that "the questions which have been determined and which could have been determined in such cases are tried over and over again"; or, as Mr. Poff put it, of aliens "shopping about for legal forums with congested dockets, by filing frivolous and dilatory pleas, and by calculated abuse of the Habeas Corpus Act." Obviously the major problem was thought to involve something quite different from simply the exercise by aliens of the right to a two-stage review of a deportation order rather than a one-stage court of appeals review. 107 Cong. Rec. 12175 (1961); 107 Cong. Rec. 18286 (1961); 105 Cong. Rec. 12726 (1959).

This view is reflected also in the diagnosis by leading supporters of the legislation of the principal cause of the problem to which the legislation was addressed. In the main, the blame was laid upon decisions of the judiciary liberalizing and broadening judicial review of deportation and exclusion orders. Thus: "[W]hen the Supreme Court, in the case of Brownell against Rubinstein held that the Declaratory Judgment Act was applicable to deportation orders, a veritable Pandora's box was opened for the benefit of these wealthy racketeers under deportation orders who now shop from court to court. . ." (Mr. Walter); "A series of Federal court decisions has precipitated chaos in the channels of appellate procedure [which] . . . has been skillfully exploited by astute lawyers employed by subversive and criminal aliens" (Mr. Poff); review of exclusion orders by declaratory judgment "is unheard of, and was in this country unknown until the Supreme Court decided the Shung case in 1956" (Mr. Walter); "[I]n recent years, as a

result of judicial decision [citing *Shaughnessy v. Pedreiro*, 349 U.S. 48, and *Brownell v. Rubinstein*, 346 U.S. 929], it has become possible for aliens to obtain judicial review of an order of deportation upon its issuance [by declaratory judgment]" (Mr. Walter); "[M]ultitudinous and repetitive court reviews [are] now available by virtue of judicial interpretations. . ." (Mr. Walter); "[T]his bending over backward [by the courts] to protect the individual has endangered the orderly administration of the law" (Mr. Hyde).[4]

Finally, in describing the advantages to be realized from the legislation, the bill's advocates focused principally upon provisions of the Act other than the direct review requirement. It is true that Mr. Walter stated in connection with several of the House bills that "[m]ost important, by eliminating review in the district courts, the bill would obviate one of the primary causes of delay in the final determination of all questions which may arise in a deportation proceeding." 107 Cong. Rec. 12176 (1961).[5] But in the con-

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[4] 107 Cong. Rec. 18286, 12176 (1961); 105 Cong. Rec. 12725 (1959); 104 Cong. Rec. 17172, 17175 (1958).

See also, *e.g.*, the following interchange:

> MR. HOFFMAN. I had in mind that case, I think it is the Green case, recently where Justice Frankfurter, writing for the minority, stated that the Court had gone off into a line of thinking where the right of the individual was being upheld at the expense of the right of all the people; that is to say, the individual had the edge on us and the rest of us had to take what was coming.
>
> MR. WALTER. May I call the attention of the gentlemen to the fact that for 80 years, I believe, habeas corpus was the only remedy, to the exclusion of others. It was not until quite recently, in the Shung case, that the Supreme Court held there was another remedy. . . .
>
> MR. HOFFMAN. What we used to believe since the coming of this new Supreme Court is in the discard. . . . [104 Cong. Rec. 17175-6 (1958).]

[5] He made the identical remark in connection with the 1958 and the 1959 House bills. 104 Cong. Rec. 17173 (1958), 105 Cong. Rec. 12726 (1959).

text of his full remarks it is clear that he meant that in his view this was the "most important" effect of the direct review provision, not that the direct review provision was the "most important" provision in the bill. Thus, this remark was followed by Mr. Walters' detailed listing of the "beneficial effects" of the bill, in which he identified the *res judicata* provision as the "most important" and relegated the direct review provision to a relatively subordinate position among the other features of the bill, including restriction of review of exclusion orders to habeas corpus actions, the statute of limitations, and the venue provision that would prevent forum-shopping.[6] In short, while Mr. Walters' statement, in contrast with the committee report, certainly supports the view that the Congress regarded the direct review

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[6] First. An alien who has been excluded. . . will have judicial review only by habeas corpus . . . . Such a [declaratory judgment] lawsuit is unheard of, and was in this country unknown until the Supreme Court decided the Shung case in 1956 . . . .

Second. Aliens . . . will be required to start their judicial review action within 6 months . . . .

Third. A deportable alien . . . will have an automatic stay of deportation, unless the court otherwise directs. It is hoped . . . that the courts of appeals will be very circumspect in granting such stays, as distinguished from district courts which are overwhelmed with work of various types . . . .

Fourth. The federal courts . . . will be relieved of a great burden . . . because excluded aliens will be restricted to habeas corpus proceedings instead of cluttering up the courts with lawsuits . . . . Deportable aliens will have to bring their action in courts of appeals, instead of the various district courts where they are now bringing the actions. Furthermore, the deportable alien will have to bring the suit in the vicinity where he lives or where the deportation proceedings was conducted. He will not be able to shop around, as at present and start his suit against the Government in a court such as the District of Columbia, for example, where the calendar is very crowded . . . .

Fifth. *Most important, the bill prevents repetitious court actions when the legal issues have once been previously disposed of.* [Emphasis added.] [107 Cong. Rec. 12176-7 (1961).]

See also the identical remarks addressed to the prior House bills at 105 Cong. Rec. 12726-7 (1959) and 104 Cong. Rec. 17173 (1958).

provision as an aid in expediting deportation cases, it does not support the view that the Congress regarded that provision as "primary," to use respondent's term, in the statutory scheme.

3. *Senate proceedings.* The proceedings in the Senate are unilluminating. The Senate bill that ultimately included Section 106 passed the Senate first as a statute to permit the entry of certain eligible alien orphans and for several other like forms of liberalization of the immigration laws. S.2237, 87th Cong., 1st Sess. See 107 Cong. Rec. 15660-15662 (1961). The House added Section 106 as an amendment and passed the bill. 107 Cong. Rec. 18281-18286 (1961). The Senate accepted the House amendments. 107 Cong. Rec. 19650-58 (1961).

Most of the Senate debate on the amended bill was occupied by a discussion of what some Senators regarded as the House's repeated practice of presenting to the Senate "at the end of a session . . . what amounts to a take-it-or-leave-it package" which "does some things which need to be done" and leaves other things undone—what "is properly called shotgun legislation on immigration" (Senators Keating and Javits) (107 Cong. Rec. 19652, 19654 (1961)). Senator Keating did state that the Senate Immigration and Naturalization Subcommittee of the Judiciary Committee had held hearings on the judicial review provision and that "every witness appearing testified in opposition," and in that connection he said that he would favor a one-year statute of limitations instead of 6 months, preservation of declaratory judgment actions in exclusion cases, and review by the district court rather than the court of appeals. *Id.*, at 19651, 19652. Others suggested that the review provisions might impose an undue financial burden on aliens. *Id.* at 19653. And Senator Eastland, who headed the Senate conferees, defended Section 106 briefly and ambiguously—*e.g.*, "As I understand it, this feature would be used probably seven or eight times a year in the case of big racketeers and subversives." *Id.*, at 19651; see also 19650, 19653. These com-

ments in combination account for all the discussion in the Senate respecting Section 106.

5. *Conclusion.* While we are inclined to discount the House committee report's treatment of Section 106 and to agree that the provision was designed to expedite the review of deportation cases, at the same time we think it clear that this provision was regarded by the Congress as but one of a group of devices tailored to that end, and not as important as some of the others. Therefore, to the extent this consideration is relevant, limiting the scope of Section 106(a) would not affect the "crucial" element in the legislative scheme.

APPENDIX

APPENDIX B

March 27, 1968

Charles Gordon, General Counsel
Immigration and Naturalization Service
HPS:PN:pb
39-62-269

Harold P. Shapiro, Chief, Administrative
Regulations Section, Criminal Division

Cheng Fan Kwok v. I.N.S.

Pursuant to your request for statistics on the volume of court cases under Section 106 of the Immigration and Nationality Act of 1952 as amended, 8 U.S.C. 1105a, we have prepared the attached analysis for the three-year period from March 1, 1965 to February 29, 1968.

During this period, 85 cases were brought in the District Court in a variety of actions including habeas corpus, injunction, and declaratory judgment. Cases in this category would generally be considered to have been properly brought in the District Court, for example habeas corpus petitions concerning bail or challenges to deportation orders more than six months after their entry. 243 petitions for review were filed in the Court of Appeals seeking review of a deportation order or other ancillary determination by a Special Inquiry Officer or the Board of Immigration Appeals as part of the deportation proceeding or by motion to reopen or reconsider. Thus, a total of 328 legal actions during this three-year period would not have been affected by the controversy presented in the present *Kwok* litigation. These cases are detailed in Part I of the attached statistics.

In contrast, 975 cases were brought challenging administrative determinations which, while not strictly part of the Section 242(b) deportation proceeding, may affect the validity or execution of the deportation order. These cases are set forth in Part II of the attachment. 834 of these cases sought review of denial by a District Director of a request

for a stay of deportation; 141 cases challenged other decisions, usually by the District Director, including the denial of a visa petition under Section 204 or a waiver under Section 212(e).

704 of the above 975 cases, however, involved aliens of Chinese ancestry who collectively only raised two or three substantive issues such as the implementation of the Section 203(a)(7) refugee provisions involved in the *Kwok* litigation or the authority of a Special Inquiry Officer to designate a country of deportation. Since scores of these cases are usually resolved by the decision in a single case, the actual burden imposed by these cases is less than their numbers might indicate and a separate category was created for the 271 cases which did not involve this Chinese multiple litigation—201 denials of stays of deportation and 70 other determinations. The final page is a breakdown of this category.

The cases counted in this study only involved some facet of deportation or some administrative action which would affect deportation or the alien's ability to reenter. Consequently, cases involving only exclusion, naturalization, revocation of naturalization, or other citizenship issues were not included.

The information contained in this study was extrapolated from a file card system maintained by our Immigration Unit. While it was not always possible to determine all of the details of each case from these cards, the general trends are clear, especially in light of the large time span and number of cases studied.

Attachments

Deportation Cases of First Impression
March 1, 1965 to February 29, 1968 Inclusive

Part I: Jurisdiction Undisputed

Circuit	District Court	Court of Appeals Section 106	Subtotals
1	0	8	8
2	48	64	112
3	3	7	10
4	1	1	2
5	8	14	22
6	3	12	15
7	1	43	44
8	2	1	3
9	15	88	103
10	0	0	0
DC	4	5	9
TOTAL	85	243	328

Part II: Jurisdiction in Question

Circuit	Stay by District Director	Other Administrative Decisions	Subtotals
1	4	1	5
	D.Ct. 1	D.Ct. 0	D.Ct. 1
	C.A. 3	C.A. 1	C.A. 4
2	598	79	677
	D.Ct. 438	D.Ct. 73	D.Ct. 511
	C.A. 160	C.A. 6	C.A. 166
3	130	12	142
	D.Ct. 2	D.Ct. 5	D.Ct. 7
	C.A. 128	C.A. 7	C.A. 135
4			0
5			0
6	2	4	6
	D.Ct. 2	D.Ct. 2	
	C.A. 0	C.A. 2	D.Ct. 4
			C.A. 2
7	88	14	102
	D.Ct. 3	D.Ct. 1	D.Ct. 4
	C.A. 85	C.A. 13	C.A. 98
8	2		2
	D.Ct. 0		D.Ct. 0
	C.A. 2		C.A. 2
9	8	17	25
	D.Ct. 5	D.Ct. 16	D.Ct. 21
	C.A. 3	C.A. 1	C.A. 4
10	1		1
	D.Ct. 1		D.Ct. 1
	C.A. 0		C.A. 0
DC	1	14	15
	D.Ct. 1	D.Ct. 14	D.Ct. 15
	C.A. 0	C.A. 0	C.A. 0
TOTAL	834	141	975
	D.Ct. 453	D.Ct. 111	D.Ct. 564
	C.A. 381	C.A. 30	C.A. 411
Non-Chinese	201	70	271

Part III: Totals For All Cases

Part I (undisputed jurisdiction) and
Part II (jurisdiction in question).

Circuit	Total-All Types
1	13
2	789
3	152
4	2
5	22
6	21
7	146
8	5
9	128
10	1
DC	24
TOTAL	1303

Part IV: Supplement

Chinese Multiple Litigation

Circuit	203(a)(7) etc.	S10 Authority to Designate Country	Subtotals
1			0
2	514	57	571
	D.Ct. 378	D.Ct. 57	D.Ct. 435
	C.A. 136	C.A. 0	C.A. 136
3	119	14	133
	D.Ct. 2	D.Ct. 2	D.Ct. 4
	C.A. 117	C.A. 12	C.A. 129
4			0
5			0
6			0
7			0
8			0
9			0
10			0
DC			0
TOTAL	633	71	704
	D.Ct. 380	D.Ct. 59	D.Ct. 439
	C.A. 253	C.A. 12	C.A. 265

APPENDIX C

MR. LINDSAY. One question on the subject of final orders of deportation and the 6 months' limitation on filing a petition for review following the final order of deportation: As the gentleman knows, the proposed bill provides that a petition for review may be filed not later than 6 months from the date of the final deportation order or from the date of this act, whichever is the later. Do I understand that that means that the 6-month period will not benefit the alien until the exhaustion of all the administrative remedies of whatever sort? Is that correct?

MR. WALTER. That is correct.

MR. LINDSAY. The gentleman knows that the immigration regulations are complicated and subject to change by the executive branch. The administrative review of orders of deportation sometimes can take different courses; so I would suggest that we make sure that the history of this is absolutely clear, that if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final.

MR. WALTER. That is correct. The final order means the final administrative order.

MR. LINDSAY. I thank the gentleman.

* * *

MR. MOORE.

* * *

Opponents of this legislation raise one point which deserves further explanation.

They claim that in some cases aliens may be induced to file court proceedings for review of their deportation order even though they may qualify for administrative or legislative relief. Let me give an example. Under section 244 of the present Immigration and Nationality Act (8 U.S.C. sec. 1254) an alien against whom a final order of deportation is issued may under certain conditions have his deportation suspended and his status adjusted to that of an alien admitted for permanent residence. Ordinarily a request for sus-

pension of deportation under this section is not made until after the determination that the alien is deportable. However, since there is no provision for tolling the 6-month period of review under the bill because of such post-deportation proceedings, it is claimed that the alien may feel compelled to file his case in court even though he has a basis for administrative relief. And once a case is filed in court, the Immigration Service may be precluded from concurrently considering a request for administrative relief because of the exclusive jurisdiction of the court over the case.

These circumstances are admittedly undesirable. However, they are not irreparable. The alien does not forfeit any avenues of administrative relief, but at most, simply has to postpone their enforcement. I have concluded that the real remedy for this situation is to be sought in a change in the present administrative practice of considering the issues of deportability and suspension of deportation piecemeal. There is no reason why the Immigration Service could not change its regulations to permit contemporaneous court consideration of deportability and administrative application for relief. That would remove this objection entirely. I am hopeful that this matter will be given further study by the committee in the near future.

MR. LINDSAY. Mr. Speaker, will the gentleman yield?

MR. MOORE. I yield to the gentleman from New York.

MR. LINDSAY. A moment ago I asked the gentleman from Pennsylvania [Mr. Walter] whether or not it was correct to say that the 6 months period would not begin to run until after the exhaustion of all administrative remedies. In my question I assumed that suspension of deportation would be included as an administrative remedy. In other words, the question of deportability would be decided one way or the other. Assuming the alien was found to be deportable, then he goes back for further administrative relief. He asks for suspension of deportation proceedings. It may take a while before there is a determination on that question.

MR. MOORE. That is correct.

MR. LINDSAY. Is it not true that the words "final deportation order" does not take effect until after determination of the question of suspension?

MR. MOORE. That is the manner in which I understand the meaning of the term as used in the pending bill.

May I say to the Members of the House that in any event I do not believe that that should delay action on this imperatively necessary legislation. In my opinion, the good points far outweigh any technical objections that may be raised against it and I very strongly support the bill and urge its approval by the House.

MR. WALTER. Mr. Speaker, during the course of the discussion the gentleman from New York raised the question of suspension of deportation. I might say to the gentleman from New York that the 6 months' period on the question of finality of an order applies to the final administrative adjudication of the applications for suspension of deportation just as it would apply to any other issue brought up in deportation proceedings. (105 Cong. Rec. 12728.)